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**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

ENVIRONMENTAL PROTECTION)	Case No.: __04-CV-4647-CRB__
INFORMATION CENTER, a non-profit)	
Californian corporation, FRIENDS OF)	AMENDED COMPLAINT FOR
THE VAN DUZEN, a community-based)	DECLARATORY AND INJUNCTIVE
grassroots watershed protection)	RELIEF
organization,)	

V.

Defendants.

2. By this suit Plaintiffs Environmental Protection Information Center (“EPIC”) and

practicable in violation of the ESA; unlawfully permitting the take of listed threatened species in

1 violation of the ESA; violating the water quality standards and antidegradation policy of the
2 Clean Water Act (“CWA”); unlawfully committing irreversible and irretrievable resources under
3 the ESA; and unlawfully issuing incidental take permits for the northern spotted owl under the
4 ESA – all arising from Federal Defendants’ approval and ongoing oversight of the Habitat
5 Conservation Plan/Incidental Take Permit for the properties of Pacific Lumber Company, Scotia
6 Pacific Holding Company, and Salmon Creek Corporation (collectively, “PL”), in Humboldt
7 County, California.

8
9 3. By this suit Plaintiffs EPIC and FOVD also challenge the actions and omissions
10 of Defendant Pacific Lumber that violate federal laws and their implementing regulations by
11 illegally taking listed threatened species and causing the improper irreversible and irretrievable
12 commitment of resources in violation of the ESA, and that violate the California Business and
13 Professional Code Section 17200, *et seq.*, by committing unlawful business practices, unfair,
14 deceptive, untrue or misleading advertising, fraudulent business practices, false advertising, and
15 misleading environmental marketing claims.

16 **JURISDICTION**

17 4. Jurisdiction is proper in this Court under 28 U.S.C. § 1331 (federal question) and
18 28 U.S.C. § 1346 (federal defendant) because this action arises under the law of the United
19 States, including the National Environmental Policy Act, 42 U.S.C. §§ 4331 *et seq.*, Endangered
20 Species Act, 16 U.S.C. §§ 1531 *et seq.*, the Clean Water Act, 33 U.S.C. § 1251 *et. seq.*, and the
21 Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706 and involves the United States as a
22 defendant, and under 28 U.S.C. § 1367 (supplemental jurisdiction). There is a present, actual
23 and justiciable controversy between the parties, and the requested relief is therefore proper under
24 28 U.S.C. § 2201 (declaratory relief) and § 2202 (injunctive relief), 16 U.S.C. §§ 1540(c) and (g)
25

1 (action arising under the ESA and citizen suit provision), and 5 U.S.C. §§ 701-706. Plaintiffs
2 may be entitled to an award of costs and attorneys fees pursuant to the Endangered Species Act,
3 16 U.S.C. § 1540(g), and/or the Equal Access to Justice Act, 28 U.S.C. § 2412 and California
4 Code of Civil Procedure § 1021.5.

5 5. To the extent required by the citizen suit provision of the ESA at 16 U.S.C. §
6 1540(g), Plaintiffs fully informed Defendants of the claims in this suit over sixty days ago.
7 Defendants have neither adequately answered nor remedied the alleged violations. Therefore, an
8 actual controversy exists between the parties within the meaning of 28 U.S.C. § 2201.
9

10 **VENUE AND INTRADISTRICT ASSIGNMENT**

11 6. Venue is proper in this Court pursuant to 16 U.S.C. § 1540(g)(3)(A) because the
12 violations occur in this district and pursuant to 28 U.S.C. § 1391 because all or a substantial part
13 of the events or omissions giving rise to the claims herein occurred within this judicial district,
14 Defendants maintain offices in this district, the lands and resources in question are located in this
15 district, and Plaintiffs EPIC and FOVD maintain offices in this district.

16 7. Intradistrict Assignment is proper in this district and division. Pursuant to Local
17 Civil Rule 3-2(d), the appropriate intradistrict assignment of this case is San Francisco Division
18 because the area in which the action arises is located in Humboldt County, and because EPIC has
19 offices and members in Humboldt County and FOVD is based in and has members throughout
20 Humboldt County.
21

22 **PARTIES**

23 8. Plaintiff ENVIRONMENTAL PROTECTION INFORMATION CENTER is a
24 non-profit corporation that is registered in California and dedicated to the preservation,
25 protection, and restoration of biodiversity, native species, watersheds and natural ecosystems in

1 northern California. EPIC maintains its offices in Humboldt County, California. EPIC has over
2 3,000 members, many of whom reside in Humboldt County, including the watersheds of the Eel
3 River, Van Duzen River, Mattole River, Elk River, Freshwater Creek, and Mad River. These
4 watersheds serve as the domestic water source and provide other beneficial uses for EPIC's
5 members, including swimming and other recreational activities. These members are adversely
6 impacted by nutrients, sediment, and other pollution that is discharged into these watersheds, and
7 rely on the proper implementation of conservation laws to ensure the uses of these rivers and
8 streams are protected and restored.

9
10 9. EPIC's members and staff regularly use lands throughout California, including
11 lands adjoining, neighboring, and/or downstream from PL's forestlands, to observe nature, enjoy
12 wild fish, birds, including endangered birds such as the marbled murrelet and northern spotted
13 owl, and the natural ecosystems in which these species live, and pursue other recreational,
14 scientific, and educational activities. EPIC's members and staff have researched, studied,
15 observed and sought protection for many species listed under the Endangered Species Act,
16 including chinook salmon and steelhead trout, as well as marbled murrelets and northern spotted
17 owls. EPIC's members and staff derive scientific, recreational, conservation, spiritual and
18 aesthetic benefits from the existence of wild salmonids, marbled murrelets, northern spotted
19 owls, the habitats they depend upon and other species associated with redwood and Douglas fir
20 forests.

21
22 10. EPIC actively participated in PL's application process for a Habitat Conservation
23 Plan ("HCP") and Incidental Take Permit ("ITP"), providing written and oral comments on their
24 legal and biological implications. Additionally, EPIC regularly participates in the review of
25 individual Timber Harvest Plans ("THPs") that are proposed by PL pursuant to its HCP and ITP.

1 EPIC brings this action on behalf of itself and its adversely affected members and staff.

2 11. Plaintiff FRIENDS OF THE VAN DUZEN is a community, grassroots
3 organization comprised of residents of and visitors to the Van Duzen River watershed. Members
4 of FOVD regularly enjoy the beneficial uses of the Van Duzen River and its tributaries,
5 including fishing, swimming, and hiking along its shores. Its members are dedicated to the
6 preservation and restoration of the Van Duzen River, and to this end, FOVD is involved in
7 educational work within the schools, commenting on proposed logging operations, participating
8 in stream restoration projects, and other efforts to prevent further degradation of the Van Duzen
9 and return the Van Duzen to its former glory. FOVD brings this action on behalf of itself and its
10 adversely affected members.
11

12 12. FOVD has participated actively in various stages of the implementation of the
13 HCP and ITP, providing written and oral comments on the legal, biological and recreational
14 implications of the watershed assessment process under the HCP's Aquatics Conservation Plan
15 and providing written and oral comments in the course of the review and approval process for
16 numerous THPs proposed by Defendant PL pursuant to the HCP and ITP.
17

18 13. The aesthetic, recreational, moral, spiritual, religious, educational, conservation,
19 and scientific interests of Plaintiffs' members have been and will continue to be adversely
20 affected and irreparably injured if Defendants continue to act and fail to act as alleged herein.
21 These are actual, concrete injuries caused by the Federal Defendants' violation of mandatory
22 duties under the ESA, NEPA, and the CWA and Defendant PL's violations of its legal duties
23 under the ESA and California law. These injuries would be redressed by the relief sought.
24

25 14. Defendant UNITED STATES FISH AND WILDLIFE SERVICE ("FWS") is an
agency or instrumentality of the United States, empowered by Congress to administer the

1 Endangered Species Act with respect to terrestrial and non-marine aquatic species.

2 15. Defendant NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
3 FISHERIES (“NOAA Fisheries”) is an agency or instrumentality of the United States,
4 empowered by Congress to administer the Endangered Species Act with respect to marine
5 species.

6 16. Defendant PACIFIC LUMBER COMPANY ("PL") is and was at all times
7 relevant hereto, a corporation organized and existing under the laws of Delaware, with its
8 principal offices in Scotia, Humboldt County, California. PL is a wholly-owned subsidiary of
9 MAXXAM Group Inc. SCOTIA PACIFIC COMPANY LLC ("SCOPAC") is and was at all
10 times relevant hereto, a corporation organized and existing under the laws of Delaware, with
11 principal offices in Scotia, Humboldt County, California. SCOPAC is a wholly-owned subsidiary
12 of PL. SCOPAC is the successor to SCOTIA PACIFIC HOLDING COMPANY. SALMON
13 CREEK LLC (“Salmon Creek”) is and was at all times relevant hereto, a corporation organized
14 and existing under the laws of Delaware, with its principle offices in Scotia, Humboldt County,
15 California. Salmon Creek is a wholly-owned subsidiary of PL. For ease of reference, PL,
16 SCOPAC, and Salmon Creek are collectively referred herein as PL.

17 17. Plaintiffs are unaware of the true names and capacities of Defendants DOES 1
18 through 30, inclusive, and therefore sue said Defendants under fictitious names. Plaintiff will
19 amend the complaint to show the true names and capacities of DOES 1 through 30 when the
20 same have been ascertained. Each of the corporate Defendants is the agent and/or employee of
21 each of the other corporate Defendants, and each performed acts on which this action is based
22 within the course and scope of such Defendants’ agency and/or employment. Plaintiff is
23 informed and believes and therefore alleges that each of the corporate Defendants is legally
24
25

1 responsible in some manner for the events and happenings referred to herein.

2 **LEGAL BACKGROUD**

3 **The Endangered Species Act**

4 18. The Endangered Species Act, 16 U.S.C. § 1531 et seq., was enacted, in part, to
5 provide a “means whereby the ecosystems upon which endangered species and threatened
6 species depend may be conserved ... [and] a program for the conservation of such endangered
7 species and threatened species....” 16 U.S.C. § 1531(b).

8 19. In order to fulfill these purposes, Federal agencies are required to consult with
9 Defendant FWS and/or Defendant NOAA Fisheries to “insure that any action authorized, funded,
10 or carried out by such agency . . . is not likely to jeopardize the continued existence of any
11 endangered species or threatened species or result in the destruction or adverse modification of
12 habitat of such species which is determined by the Secretary . . . to be critical” 16 U.S.C. §
13 1536(a)(2) (“Section 7 consultation”).
14

15 20. Section 7 consultation is required for “any action [that] may affect listed species
16 or critical habitat.” 50 C.F.R. § 402.14. An agency “action” is defined in the ESA’s
17 implementing regulation to include “actions directly or indirectly causing modifications to the
18 land, water, or air.” 50 C.F.R. § 402.02.

19 21. At the completion of the Section 7 consultation process Defendant FWS or
20 Defendant NOAA Fisheries issues a Biological Opinion (“BO”) that determines if the agency
21 action is likely to jeopardize the species’ continued survival or result in the destruction or
22 adverse modification of the species’ critical habitat. If so, the opinion may specify “Reasonable
23 and Prudent Alternatives” designed to avoid jeopardy while allowing the agency to proceed with
24 the action. 16 U.S.C. § 1536(b).
25

1 22. In making their determinations regarding jeopardy to listed species and the
2 destruction or adverse modification of those species' critical habitat, Defendants FWS and
3 NOAA Fisheries are required to "use the best scientific and commercial data available." 16
4 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(d).

5 23. The agency "shall" reinitiate formal consultation with FWS:

- 6 (a) If the amount or extent of taking specified in the incidental take
7 statement is exceeded;
8 (b) If new information reveals effects of the action that may affect
9 listed species or critical habitat in a manner or to an extent not
10 previously considered;
11 (c) If the identified action is subsequently modified in a manner
that causes an effect to the listed species or critical habitat that was
not considered in the biological opinion;

11

12 50 C.F.R. §§ 402.16(b) and (c).

13 24. Section 9 of the ESA prohibits the "take" of any fish or wildlife species listed
14 under the ESA as endangered; under Federal regulation, take of fish or wildlife species listed as
15 threatened is also prohibited unless otherwise specifically authorized by regulation. 16 U.S.C. §
16 1538(a)(1). Section 9 of the ESA also prohibits any person to attempt to commit, solicit another
17 to commit, or cause to be committed any take that is not properly authorized. 16 U.S.C. §
18 1538(g).

19 25. "Incidental take" of endangered and threatened species of wildlife by non-Federal
20 entities is permitted if certain conditions are satisfied under Section 10 of the ESA. 16 U.S.C. §
21 1539(a)(1).

22 26. In order to receive an Incidental Take Permit ("ITP") from the FWS and/or
23 NOAA Fisheries, the applicant must submit a "Habitat Conservation Plan" ("HCP") which
24 specifies: (1) how the proposed activity will likely affect listed species; (2) what steps the
25

1 applicant will take to monitor, minimize, and mitigate such impacts, and what funding will be
2 available to carry out these steps; (3) what alternative actions to such taking the applicant
3 considered and the reasons why such alternatives are not being utilized; and (4) such other
4 measures that the FWS and/or NOAA Fisheries may require as being necessary or appropriate
5 for purposes of the plan. 16 U.S.C. § 1539(a)(2)(A)(i)-(iv).

6 27. The FWS and/or NOAA Fisheries shall issue an ITP to the applicant if they find
7 (1) that the take will be incidental, (2) that the applicant will, to the maximum extent practicable,
8 minimize and mitigate the impacts of such taking, (3) that the applicant will ensure that adequate
9 funding will be provided, (4) that the taking will not appreciably reduce the likelihood of
10 survival and recovery of the species, and (5) that the measures, if any, required by FWS and/or
11 NOAA Fisheries will be met. 16 U.S.C. § 1539(a)(2)(B). FWS and/or NOAA Fisheries shall
12 revoke a permit if the applicant fails to comply with the terms and conditions of the permit. 16
13 U.S.C. § 1539(a)(2)(C).

14 28. Issuance of an ITP is a Federal action subject to Section 7 of the ESA. See FWS
15 and NOAA Fisheries Habitat Conservation Planning Handbook at 1-6 and 6-12 to 6-18. This
16 means that the FWS and/or NOAA Fisheries must conduct an internal (or intra-Service) formal
17 Section 7 consultation on permit issuance.

18 29. Since the issuance of an ITP is a Federal action that will clearly result in take and
19 the Section 7 implementing regulations, 50 C.F.R. 402.14(i), require an incidental take statement
20 (“ITS”) in a BO where the Federal action is expected to result in take, the resultant BO for the
21 HCP/ITP will include incidental take statements. Any reasonable and prudent measures or terms
22 and conditions provided in the ITS should be consistent with the conservation program in the
23 HCP.
24
25

1 30. Section 7(d) of the ESA provides that the pending completion of formal
2 consultation with the FWS and/or NOAA Fisheries, the action agency "shall not make any
3 irreversible or irretrievable commitment of resources with respect to the agency action which has
4 the effect of foreclosing the formulation or implementation of any reasonable and prudent
5 alternative measures which would not violate subsection (a)(2) of this section." 16 U.S.C. §
6 1536(d); 50 C.F.R. § 402.09. The intent of Section 7(d) is to avoid harm to the affected species
7 pending the completion of interagency consultation.

8 31. Section 10 of the ESA creates an exception to the general ban on taking. Under
9 that section, the Federal Defendants may issue a permit allowing "any taking otherwise
10 prohibited by Section 1538(a)(1)(B) of this title if such taking is incidental to, and not the
11 purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. § 1539(a)(1)(B).
12 Several conditions must be met prior to the grant of an incidental take permit. The applicant for
13 the permit must submit a conservation plan, known as a "Habitat Conservation Plan" or "HCP,"
14 that describes:

15
16 (i) the impact which will likely result from such taking; (ii) what steps the
17 applicant will take to minimize and mitigate such impacts ...; (iii) what
18 alternative actions to such taking the applicant considered and the reasons
19 why such alternatives are not being utilized; and (iv) such other measures
20 that the Secretary may require as being necessary or appropriate for
21 purposes of the plan.

22 Id. § 1539(a)(2)(A). The Federal Defendants must publish notice of the permit application in the
23 Federal Register, and "information received by the [Federal Defendants] as part of [the]
24 application shall be available to the public as a matter of public record at every stage of the
25 proceeding." Id. § 1539(c). The Federal Defendants also must provide an "opportunity for
public comment" on the application and related conservation plan. Id. § 1539(a)(2)(B). Finally,

1 before issuing the permit the Federal Defendants must make certain specified findings. These
2 include findings that the taking will be incidental, that it "will not appreciably reduce the
3 likelihood of the survival and recovery of the species in the wild," and that "the applicant will, to
4 the maximum extent practicable, minimize and mitigate the impacts of such taking." Id.

5 **The National Environmental Policy Act**

6 32. Issuance of an ITP, under and HCP, is a Federal action subject to NEPA
7 compliance. See FWS and NOAA Fisheries Habitat Conservation Planning Handbook at 1-6.

8 33. A central purpose of NEPA is to ensure that an agency "will not act on incomplete
9 information, only to regret its decision after it is too late to correct." Marsh v. Oregon Natural
10 Resources Council, 490 U.S. 360, 374 (1989); Friends of the Clearwater v. Dombeck, 222 F. 3d
11 552, 557-558 (9th Cir. 2000). In view of this purpose, an agency cannot simply rest on an
12 existing environmental review document but must instead take a "hard look" at new information
13 that might alter the results of its original environmental analysis. Id. at 374.

14 34. Federal agencies must prepare supplements to either draft or final EIS's if there
15 "are significant new circumstances or information relevant to environmental concerns and
16 bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9 (c)(1).

17 35. NEPA imposes a continuing duty to supplement previous environmental
18 documents. Stop H-3 Ass'n v. Dole, 740 F.2d 1442, 1463 (9th Cir. 1984). "A federal agency has
19 a continuing duty to gather and evaluate new information relevant to the environmental impact of
20 its actions. . . . [W]hen new information comes to light the agency must consider it, evaluate it,
21 and make a reasoned determination whether it is of such significance as to require [an SEIS]." Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017, 1024 (9th Cir. 1980).

22 36. The decision whether to prepare a supplemental EIS is similar to the decision
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1 whether to prepare an EIS in the first instance: "If there remains 'major Federal actio[n]' to occur,
2 and if the new information is sufficient to show that the remaining action will 'affec[t] the quality
3 of the human environment' in a significant manner or to a significant extent not already
4 considered, a supplemental EIS must be prepared." See Marsh v. Oregon Natural Res. Council,
5 490 U.S. 360, 374 (1989); Friends of the Clearwater v. Dombeck, 222 F.3d at 557-558.

6 37. A NEPA document is no longer adequate when "[t]here are significant new . . .
7 circumstances or information relevant to environmental concerns and bearing on the proposed
8 action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii). "Reliance on stale scientific evidence is
9 sufficient to require re-examination of an EIS." City of Carmel-by-the-Sea v. U.S. Dept of
10 Transportation, 95 F.3d 892, 900 (9th Cir. 1995). At that point the agency must wait until it has
11 supplemented the EA or EIS with the new information, before taking further actions based on the
12 outdated EIS. 40 C.F.R. 1502.9(c)(1)(ii). NEPA requirements must be fulfilled "before
13 decisions are made and before actions are taken." *Id.* at §§ 1500.1(b), 1502.5; Save the Yaak
14 Committee v. Block, 840 F.2d 714, 718 (9th Cir. 1988).

16 38. A supplemental document is necessary where new information "presents a
17 seriously different picture of the likely environmental consequences of the proposed action not
18 adequately envisioned by the original EIS." Wisconsin v. Weinberger, 745 F.2d 412, 420 (7th
19 Cir. 1984).

20 39. A change in information, requiring NEPA supplementation "need not be strictly
21 environmental . . .; the test is whether the new information so alters the project's character that a
22 new 'hard-look' at the environmental consequences is needed. . . . [I]nformation 'that does not
23 seriously change the environmental picture, but that nevertheless affects, or could affect, the
24 decisionmaking process, is subject to the procedural requirements of NEPA.'" Natural
25

1 Resources Defense Council v. Lujan, 768 F. Supp. 870, 886-87 (D.D.C. 1991) (quoting Sierra
2 Club v. Froehlke, 816 F.2d 205, 210, 212 (5th Cir. 1987).

3 40. When new information comes to light the agency must consider it, evaluate it, and
4 make a reasoned determination whether it is of such significance as to require implementation of
5 formal NEPA filing requirements. Warm Springs Dam II v. Gribble, 621 F.2d 1017, 1024 (9th
6 Cir.1980). Reasonableness depends on the environmental significance of the new information,
7 the probable accuracy of the information, the degree of care with which the agency considered
8 the information and evaluated its impact, and the degree to which the agency supported its
9 decision not to supplement with a statement of explanation or additional data. Id.
10

11 **The Clean Water Act**

12 41. The primary objective of the Federal Water Pollution Control Act, commonly
13 referred to as the Clean Water Act (“CWA”), is “to restore and maintain the chemical, physical,
14 and biological integrity of the Nation’s waters.” 33 U.S.C § 1251(a). Case authority supports
15 the interpretation that the CWA requires maintenance of the natural structure of streams: the
16 “Clean Water Act should be construed broadly to encompass deleterious environmental effects
17 of projects.” Riverside Irrigation Dist. v. Andrews, 568 F. Supp. 583, 588 (D. Colo. 1983), aff’d
18 758 F.2d 508 (10th Cir. 1983).

19 42. Under the Clean Water Act, all federal agencies must comply with state water
20 quality standards and the antidegradation policy. 33 U.S.C. §§ 1313, 1323(a). Judicial review of
21 this requirement is available under the Administrative Procedure Act. Oregon Natural Resources
22 Council v. United States Forest Service, 834 F.2d 842, 852 (9th Cir.1987); Idaho Sporting
23 Congress v. Thomas, 137 F.3d 1146, 1153 (9th Cir. 1998); Marble Mountain Audubon Soc’y v.
24 Rice, 914 F.2d 179, 182-83 (9th Cir. 1990); Oregon Natural Resources Council v. Lyng, 882
25

1 F.2d 1417, 1424-25 (9th Cir. 1989) (“The CWA also requires states to implement water quality
2 standards with which federal agencies must comply.”); Northwest Indian Cemetery Protective
3 Ass’n v. Peterson, 795 F.2d 688 (9th Cir. 1986), *rev’d on other grounds sub. nom. Lyng v.*
4 Northwest Indian Cemetery Protective Ass’n, 485 U.S. 439 (1988); NWF v. Corps of Engineers,
5 92 F. Supp.2d 1072 (D. Or. 2000) and 132 F.Supp. 2d 876 (D. Or. 2001) (finding that federal
6 agency failed to address compliance with state water quality standards in its operation of dams
7 on the Snake River).

8 43. “A water quality standard defines the water quality goals of a water body, or
9 portion thereof, by designating the use or uses to be made of the water and by setting criteria
10 necessary to protect the uses.” 40 CFR § 131.2. EPA regulations implementing the CWA define
11 designated uses of water as “those uses specified in water quality standards for each water body
12 or segment whether or not they are being attained.” 40 CFR § 131.3(f). The minimal designated
13 use for a water body is the “fishable/swimmable” designation, which “provides for the protection
14 and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water.”
15 33 U.S.C. § 1251(a)(2).

16 44. The U.S. Supreme Court has held that:

17
18 The text [of the CWA] makes it plain that water quality standards contain two
19 components. We think the language of § 303 is most naturally read to require
20 that a project be consistent with *both* components, namely, the designated uses
21 *and* the water quality criteria. Accordingly, under the literal terms of the statute,
a project that does not comply with a designated use of the water does not comply
with the applicable water quality standards.

22 PUD No. 1 of Jefferson County v. Washington Department of Ecology, 511 U.S. 700, 714-715
23 (1994).

24 45. According to federal regulation, applicable antidegradation policies “shall, at a
25

1 minimum, be consistent with . . . [e]xisting instream water uses and the level of water quality
2 necessary to protect the existing uses shall be maintained and protected.” 40 CFR §131.12(a)(1).
3 Under this regulation, ““no activity is allowable . . . which could *partially* or completely
4 eliminate any existing use.”” PUD No. 1, 511 U.S. at 718-19 (citing EPA, Questions and
5 Answers on Antidegradation 3 (Aug. 1985)). Therefore, the antidegradation policy serves to
6 protect the existing uses of all streams. Any activity which would even *partially* eliminate those
7 uses is not permitted.

8
9 46. Under the antidegradation policy, existing uses are recognized as all beneficial
10 uses that humans, native plants, invertebrates, mammal, bird, and other species have derived
11 from waterbodies since November 28, 1975. 40 CFR 131.12(a)(1).

12 47. The EPA's regulations establish three levels of water quality protection: Tier I,
13 Tier II, and Tier III. Tier I protection establishes the minimum water quality standard for all
14 waters and requires that "[e]xisting instream water uses and the level of water quality necessary
15 to protect the existing uses shall be maintained and protected." 40 C.F.R. § 131.12(a)(1). Tier II
16 protection provides that, where the water quality of a water body exceeds that necessary to
17 support aquatic life and recreation, that level of water quality shall be maintained unless the state
18 determines that "allowing lower water quality is necessary to accommodate important economic
19 or social development in the area in which the waters are located." 40 C.F.R. § 131.12(a)(2).
20 Tier III protection provides that, where a water body "constitute[s] an outstanding National
21 resource, such as waters of National and State parks and wildlife refuges and waters of
22 exceptional recreational or ecological significance, that water quality shall be maintained and
23 protected." 40 C.F.R. § 131.12(a)(3). Watercourses that have been listed under the Federal
24 and/or California Wild and Scenic River Acts, such as the Van Duzen and Eel Rivers, and those
25

1 that have special recreational recognition as state or county parks, such as the watercourses
2 flowing through Grizzly Creek State Park, Cheatem Grove, Pamplin Grove and Swimmer's
3 Delight on the Van Duzen, are entitled to Tier III protection.

4 48. The California State Water Resources Control Board, Resolution No. 68-16, sets
5 out California's water quality standards, including the potential and existing beneficial uses and
6 the state's antidegradation policy.

7 **California Unfair Competition Law**

8 49. Unfair competition is prohibited by the State of California's Unfair Competition
9 Law ("UCL"). Cal Bus. & Prof. Code § 17200. Unfair competition is defined to mean and
10 include any unlawful, unfair or fraudulent business act or practice. Bus & Prof Code §17200.
11 Any unlawful business practice, including violations of laws for which there is no direct private
12 right of action, may be redressed by private action under UCL. *See* Bus. & Prof. Code § 17200.
13 It is not necessary that predicate law provide for private civil enforcement in order for a citizen
14 to bring an action pursuant to Section 17200. *Id.*

15 50. Violations of the California Forest Practice Act, California Forest Practice Rules,
16 the HCP, and/or the ITP constitute violations of the UCL. *Id.* Similarly, false and deceptive
17 advertisements are prohibited by and constitute a violation of the UCL. *Id.* and 17500.

18 51. Section 17203 of the UCL states that "Any person who engages, has engaged, or
19 proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction.
20 The court may make such orders or judgments, including the appointment of a receiver, as may
21 be necessary to prevent the use or employment by any person of any practice which constitutes
22 unfair competition, as defined in this chapter, or as may be necessary to restore to any person in
23 interest any money or property, real or personal, which may have been acquired by means of
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25

1 such unfair competition.”

2 **FACTS GIVING RISE TO PLAINTIFFS’ CAUSE OF ACTION**

3 **Background**

4 52. Underlying this dispute are approximately 211,000 acres of land owned and
5 operated by PL. These lands are comprised of redwood and Douglas fir forests and are home to
6 a number of imperiled species, including the marbled murrelet, coho salmon, chinook salmon,
7 steelhead trout, coastal cutthroat trout, northern spotted owl, bald eagle, American peregrine
8 falcon, northern goshawk, western snowy plover, bank swallow, Pacific fisher, Humboldt
9 marten, red tree vole, Townsend’s big-eared bat, foothill yellow-legged frog, tailed frog,
10 southern torrent salamander, and northwestern pond turtle. PL lands occur primarily in
11 watersheds of the Elk, Van Duzen, Eel, Bear, Salt, and Mattole Rivers.

13 53. Of the species listed above, the American peregrine falcon, northern spotted owl,
14 marbled murrelet, coho salmon, chinook salmon, steelhead trout, coastal cutthroat trout, bald
15 eagle, and western snowy plover are listed as endangered or threatened under the ESA.

16 54. The marbled murrelet also has recognized critical habitat under the ESA. Of the
17 areas identified as critical habitat, approximately 40,417 acres are owned by PL and other private
18 entities and another 97,000 acres of government-owned land are in proximity to the PL lands.

19 55. NOAA Fisheries also has designated critical habitat for the coho salmon pursuant
20 to the ESA. *See* 64 Fed. Reg. 24049. This critical habitat includes all of the watersheds that are
21 affected by logging operations carried out by PL, including Freshwater Creek, Elk River, Van
22 Duzen River, Eel River, Bear River, and Mattole River.

24 56. The marbled murrelet faces the serious threat of extinction because it relies on
25 old-growth forests, and exclusively on ancient redwood and Douglass fir forests in northern

1 California for nesting and foraging. There is no evidence that murrelets can survive in second-
2 growth forests. FWS's Recovery Plan for the marbled murrelet stresses that its survival depends
3 on the protection of all nesting habitat that currently exists. It also stresses that there should be
4 very little loss of forests that could develop into murrelet habitat over the next 50 to 100 years.

5 57. The old-growth and residual forests on PL lands, including the six ancient groves
6 of Headwaters Forest, are critical nesting areas for the California murrelet population. These
7 forests form a crucial biological link between murrelet habitat areas in Redwood National Park to
8 the north and Humboldt Redwoods State Park to the south. The link is so crucial, and the species
9 as a whole so imperiled, that some murrelet experts believe loss of the remaining PL groves
10 could trigger a collapse of the population throughout California and beyond.

11
12 58. The old-growth and residual forests on PL lands also provide spawning and
13 rearing habitat for coho salmon, chinook salmon, steelhead trout, and coastal cutthroat trout.

14 59. Salmonids are anadromous fish, spending the first several months of their lives in
15 freshwater streams and rivers before migrating out to sea. When their life-cycles are complete,
16 they return to the streams of their birth, where they spawn and then die. Coho and chinook
17 salmon and steelhead trout depend on clean cold freshwater habitat at the juvenile and spawning
18 stages of their lives. They require clean gravel beds where they dig their redds, which are
19 depressions in the streambed into which they lay their eggs. Recently hatched young, known as
20 alevins, remain in the gravel substrate until they are sufficiently developed to swim on their own.
21 Fingerling and juvenile salmon and steelhead spend many months (or in the case of coho,
22 sometimes more than a year) growing to maturity in the freshwater streams and rivers.

23
24 60. Coho salmon spawn between November and January and occasionally into
25 February and March.

1 61. Salmonids are extremely sensitive to high water temperatures and high
2 concentrations of sediment. Sustained temperatures much over 70 degrees Fahrenheit can kill
3 coho and chinook salmon and steelhead trout. Dense, shady forest along the stream banks, as
4 well as deep sheltering pools, are essential for salmonid survival. Reduction of the shade canopy
5 and loss of downed woody debris (essential for the creation of pools) can significantly impact
6 salmonids.

7 62. Sedimentation due to logging also presents a serious threat to the survival of
8 salmonids. Logging and road building on the steep, erodible hillsides of coastal Northern
9 California can flush hundreds of thousands of cubic yards of fine sediment into streams and
10 rivers each winter. Loss of root structure also contributes to increased sedimentation. This
11 sediment clogs the gravel substrate that poses a significant threat to spawning salmon;
12 suffocating newly laid eggs, reducing available protective habitat for alevins, and reducing
13 suitable habitat to lay eggs.
14

15 63. Industrial forestry also significantly alters the hydrology of coastal watersheds,
16 affecting the way each winter's tremendous volume of rainfall moves through the soil and into
17 local streams. During heavy rains, logged-over areas have a tendency to liquefy, sending a
18 "debris torrent" composed of rock and mud coursing down hillsides and into stream channels. In
19 1998, such a torrent, originating on a PL clearcut, destroyed seven homes in the town of Stafford,
20 California. Another torrent, also originating from a PL clearcut, devastated most of the salmon
21 habitat in the Bear Creek watershed during the same January 1, 1998 storm event. PL's timber
22 harvesting under the HCP and ITP has continued to have devastating impacts on salmon habitat
23 that were not adequately considered in the BO, HCP, or ITP, including debris torrents and
24 buildup of sediment walls from four to eight feet high at the mouths of tributary creeks, such as
25

1 Grizzly and Hely Creeks in the Van Duzen watershed, effectively obliterating salmon habitat in
2 those portions of the affected watersheds.

3 64. Estimates of historic coho populations in Northern California and Southern
4 Oregon range from 125,000 to 400,000. Today, only about 10,000 wild, naturally spawning
5 coho remain in this region.

6 **PL's HCP and ITP**

7 65. On June 12, 1998, PL applied for an ITP from the FWS and NOAA Fisheries. *See*
8 63 Fed. Reg. 37900. The ITP would authorize PL to incidentally take 17 listed species and some
9 species that are not currently listed, but may become listed during the fifty-year period for which
10 the ITP would allow take.

11 66. In July 1998, in conjunction with its permit application, PL submitted a proposed
12 HCP in accordance with the requirements of ESA Section 10(a)(2)(A)), 16 U.S.C. §
13 1539(a)(2)(A), and a proposed Implementation Agreement. 63 Fed. Reg. 37900.

14 67. As part of the process leading up to the issuance of the ITP, FWS and NOAA
15 conducted an internal ESA Section 7 consultation over the Federal Defendants' proposal to issue
16 an ITP to PL pursuant to Section 10(a)(1)(B) and its implementing regulations at 50 C.F.R. Parts
17 17 and 222, respectively.

18 68. Concurrently, the Federal Defendants also prepared an EIS for the HCP.

19 69. On February 24, 1999, FWS and NOAA Fisheries issued a joint BO, including an
20 Incidental Take Statement ("ITS") pursuant to Section 7 of ESA, 16 U.S.C. § 1536 on PL's
21 request for the ITP.

22 70. On February 25, 1999, the Federal Defendants finalized their Record of Decision
23 ("ROD") supporting the issuance of the ITP and related actions.
24
25

71. On February 26, 1999 FWS and NOAA Fisheries issued the ITP to Pacific Lumber, pursuant to Section 10 of the ESA, upon finalization of the Headwaters Agreement.

72. On March 1, 1999, the Headwaters Agreement was finalized and both the BO and the ITP were released.

73. The ITP allowed PL to take unspecified numbers of covered species, including marbled murrelet and coho salmon, in the course of logging and other specified activities on PL property.

74. The ITP for the marbled murrelet allows PL to log 10,000 acres of potentially suitable marbled murrelet nesting habitat, including 2,225 acres of Critical Habitat that was designated for its survival. See EIS/EIR Table 3.10-6. This represents an unprecedented amount of authorized “take” for this highly imperiled seabird.

75. To offset this “take,” PL was required to “set aside” certain areas of old-growth and residual forest for the next fifty years. However, these “marbled murrelet conservation areas” (“MMCAs”) do not provide permanent protection.

Marbled Murrelets

A. New Information Indicates Oil Spills Have Greater Impact than Expected.

76. In November 1997, the M/V Kure spilled substantial quantities of oil in Humboldt Bay. PL's HCP includes a brief discussion of the M/V Kure oil spill, but modeling efforts to assess the impacts to the marbled murrelet were not completed when the HCP was approved. *See* PL HCP page 135. It was only known that nine murrelets were found dead from the spill, and that the "actual mortality was probably several times higher." *Id.* Modeling efforts have since been completed, and this information shows the number of birds killed was much greater

1 than contemplated in the HCP, with approximately 151 murrelets perishing in the M/V Kure oil
2 spill.

3 77. In September 1999, the Bean-Stuyvesant oil spill occurred just outside Humboldt
4 Bay, killing approximately 135 individual murrelets. Together with the M/V Kure spill, it is
5 believed these two spills caused direct mortality to approximately 10% of the Marbled Murrelet
6 Conservation Zone (“MMCZ”) 4 population, which includes the PL property.

7 78. Another significant oil spill, from the New Carissa, occurred in Coos Bay, Oregon
8 in February and March 1999, after the effects analysis of the PL HCP had been completed. The
9 spill was in the southern part of Zone 3 and killed an estimated 262 murrelets. Also following
10 completion of the effects analysis, FWS revised downward its estimate of the Zone 6 population.
11

12 **B. New Information Indicates that Murrelets Do Not Use Conserved Habitat.**

13 79. New information shows that for a period of time, murrelets will not use some of
14 the conserved habitat that the BO anticipated would be used.

15 80. The Humboldt Bay-area oil spills killed murrelets that would otherwise have
16 occupied and bred in habitat that the HCP conserved as mitigation for other murrelet habitat
17 currently being logged by Pacific Lumber.

18 81. A significant period of time will elapse before this depopulated habitat, relied
19 upon by the BO to mitigate the loss of other murrelet habitat, becomes colonized by murrelets.
20 New information therefore shows the impacts from the HCP will be larger than anticipated
21 because the mitigation analyzed in the FEIS/EIR will not work effectively.
22

23 **C. New Information Indicates FWS Underestimated Level of Take.**

24 82. New information shows that FWS underestimated the HCP’s take of murrelets by
25 relying on surveys that took place in abnormal conditions and under-counted murrelets.

1 83. Surveys of potential murrelet habitat done after the November 1997 M/V Kure
2 spill under-counted murrelet occupancy compared to “normal” circumstances and, therefore,
3 underestimated the number of murrelets affected by the HCP. The post-Kure surveys determined
4 not the “normal” level of occupancy, but rather an occupancy level temporarily reduced because
5 of mortality from the M/V Kure spill. As a result, these surveys underestimated the amount of
6 occupied habitat in areas that will be logged, and resulted in an underestimation of the impact of
7 HCP to murrelet in the bioregion.

8 84. While the BO and ITP did not quantify the level of take in terms of individual
9 murrelets, they did specify take in terms of murrelet habitat affected and the value of that habitat.
10 For the reason described above, the value of destroyed habitat exceeds the level specified in the
11 ITP/ITS.

12 85. The BO overestimated the usefulness of the conserved habitat because it did not
13 anticipate depopulation caused by oil spills.

14 86. The BO also underestimated the value of the habitat designated for logging,
15 wrongly concluding that habitat found unoccupied was normally unoccupied, because FWS did
16 not know that surveys were temporarily affected by the November 1997 spill.

17
18 **D. HCP Has Greater Impact than Previously Considered on the Murrelet Population’s**
19 **Survival and Recovery.**

20 87. New information shows that fewer murrelet exist across their entire population
21 range than previously believed. Murrelet Conservation Zone 6 population estimates are
22 substantially lower than previously believed, and Zones 3 and 4 have experienced catastrophic
23 oil spills. FWS found that to ensure the eventual long-term survival and recovery of the
24 murrelet, Zones 1 through 4 must be managed to produce and maintain viable marbled murrelet
25

1 populations that are well distributed throughout the prospective Zones. Because the “margin of
2 safety” separating murrelets from extinction is much smaller than previously believed, the
3 impact of the HCP on murrelets overall is larger than previously believed.

4 88. Second, for all the reasons previously described, the effect of the HCP on the local
5 Pacific Lumber murrelet population is greater than previously believed. In its analysis, the BO
6 assumed a smaller effect on local murrelet populations than is now known to be the case, against
7 a backdrop of an overall population level assumed to be much higher than is now known to be
8 the case. Because the HCP has a larger impact to a smaller safety margin for murrelets, the new
9 information shows the HCP adversely affects murrelets to an extent not considered in the BO.

10
11 **E. May 2004 Scientific Report Warns of Extinction.**

12 89. In May of 2004, a scientific report commissioned by FWS was released that shows
13 that the marbled murrelets faces a 100% probability of extinction in California in the next 40
14 years under current management regimes. *See* Evaluation Report for the 5-Year Status Review
15 of the Marbled Murrelet in Washington, Oregon, and California, March 2004.

16 90. This report concluded that “...the rate and risk of habitat loss in Oregon and
17 California on private lands have likely remained the same since listing (that is, high).... Besides
18 stochastic events, the greatest ‘loss’ of habitat in the 3-state area has resulted from consultations
19 on individual harvest units, individual trees, and large amounts of suitable habitat through
20 HCPs.” *Id.*

21 91. The report further states that “[h]abitat loss has continued. Known occupied
22 habitat has been lost. Loss of suitable habitat is expected to continue in the future based on
23 ongoing Section 7 consultations and full implementation of approved HCPs. Since 1994, the rate
24 of habitat loss has declined substantially on Federal land under the NWFP, and the rate has likely
25

1 declined in Washington where State protection guidelines have been developed. The relative
2 threat of habitat loss has not changed on non-Federal land in Oregon, which has no protective
3 measures, or California, which protects the murrelet under state ESA.” Id.

4 **Salmonids and Water Quality**

5 92. Water quality is of particular concern for the watersheds within PL lands. The
6 streams within these watersheds are all formally listed as “impaired” under Section 303(d) of the
7 CWA due to excessive amounts of temperature and/or sediment pollution. 33 U.S.C. § 1313(d).
8

9 93. On September 9, 2000, the North Coast Regional Water Quality Control Board
10 (“Water Board”) staff published a report (“Staff Report”) detailing deficiencies in the HCP that
11 fail to protect beneficial water uses, and proposing additional requirements that are necessary to
12 comply with applicable water quality standards.

13 94. New information in the Staff Report includes the following: (1) evidence that the
14 HCP’s Mass Wasting Avoidance Strategy will not avoid landslides because slides occur on
15 slopes not identified for protection and because it fails to model the effect of logging on
16 landslides; (2) evidence that HCP interim streamside buffers may not be effective in mitigating
17 discharges of fine sediment; and (3) evidence that Bear Creek and the North Fork Elk River will
18 not recover as anticipated in the HCP, especially in the short-term (regarding Bear Creek, *see*
19 *also* Water Board Staff Non-concurrence with Second Review Team Chairman’s
20 Recommendation of Approval for Timber Harvest Plan (THP) 1-01-112 HUM “Bear Thin”).
21

22 95. The Water Board has identified other new information indicating deficiencies in
23 how PL’s HCP works in practice. For example, the Water Board published information
24 indicating that field verification of mass-wasting areas would only be done to disqualify areas
25 suspected of being prone to landsliding, and not to identify new landslide areas that had been

missed. *See* Water Board Staff Response to Testimony by Thomas E. Koler.

The Water Board has also shown that PL's logging operations under its HCP allow high-impact silvicultural methods that violate water quality standards for turbidity, sediment, temperature, and other pollution. For example, with respect to a recent PL Timber Harvest Plan ("THP"), the Water Board stated:

The THP proposes felling large Old Growth trees on steep slopes and dragging them upslope long distances with cables to the ridgeline. We anticipate that proposed winter operations in the plan area will elevate soil transport into the nearby watercourses, in violation of Basin Plan standards.

See Water Board Staff Non-concurrence with Second Review Team Chairman's Recommendation of Approval for Timber Harvest Plan (THP) 1-04-220 HUM, October 26, 2004. Regarding another logging operation, the Water Board stated:

We are concerned that THP 1-03-126 HUM, as proposed for approval by CDF Second Review Team chair's recommendation, will violate our Basin Plan prohibitions and narrative water quality objectives through discharge of sediment, add to the existing nuisance flooding condition by itself and/or when combined with other CDF-approved THPs in the watershed as a cumulative effect that represents an ongoing threat to the public safety, health, and welfare for those residents that reside in the Freshwater Creek Watershed.

See Water Board Staff Non-concurrence with Second Review Team Chairman's Recommendation of Approval for Timber Harvest Plan (THP) 1-03-126 HUM, November 18, 2003. The Water Board also noted that

[O]n December 3, 2003, the Regional Water Board unanimously adopted a series of motions upon concluding that additional regulatory and non-regulatory actions, beyond those currently in place under the California Forest Practice Rules and the Pacific Lumber Company's...Habitat Conservation Plan, are necessary to address water quality impacts due to the rate and scale of land disturbing activities...[I]t is necessary to incorporate the sediment offset strategy...in order to mitigate for sediment discharges contributing to cumulative impacts to the beneficial uses of water. We believe that, without such mitigation in place, this THP does not comply with the Basin Plan....

1 See Water Board Staff Non-concurrence with Second Review Team Chairman's
2 Recommendation of Approval for Timber Harvest Plan (THP) 1-04-001 HUM. The Water
3 Board has issued numerous other "non-concurrence" letters that set forth the reasons it believes
4 PL's logging operations violate applicable water quality standards. E.g., Water Board Staff non-
5 concurrences for THPs 1-01-141 HUM, 1-01-318 HUM, 1-01-345 HUM, 1-01-363 HUM, 1-01-
6 387 HUM, 1-01-404 HUM, 1-02-052 HUM, 1-02-197 HUM, 1-02-218 HUM, 1-02-245 HUM,
7 1-02-258 HUM, 1-02-269 HUM, 1-03-002 HUM, 1-03-007 HUM, 1-03-018 HUM, 1-03-051
8 HUM, 1-03-053 HUM, 01-03-125 HUM, 1-03-126 HUM, 1-03-140 HUM, 1-03-177 HUM, 1-
9 03-198 HUM, 1-04-001 HUM, 1-04-079 HUM, 1-04-155 HUM, 1-04-168 HUM, 1-04-184
10 HUM, and others.

11
12 96. Under California state water quality standards, Class I streams are defined as those
13 that currently support or could support fish. Class II streams are those supporting other aquatic
14 life, including amphibians and invertebrates. Class III streams are those that do not support
15 aquatic life.

16 97. In 2002, the North Coast Regional Water Quality Control Board commissioned an
17 independent panel of scientists to examine the impacts of PL's logging on the beneficial uses of
18 water.

19 98. In January 2003, the Humboldt Watersheds Independent Scientific Review Panel
20 released its report, which unanimously concluded that "the THP-SYP-HCP structure lacks some
21 of the key elements needed to move toward and assure attainment of water quality standards."

22 99. In February 2003, the North Coast Regional Water Quality Control Board asked
23 the Independent Scientific Review Panel to do a more detailed analysis of PL's HCP.

24 Specifically, the Regional Board asked the Panel to examine the prescriptions and protections of
25

1 the HCP, developed as part of the Aquatic Conservation Plan, (and SYP/THP process) and their
2 effectiveness in limiting sediment production and allowing for the recovery of the beneficial uses
3 in five impacted watersheds. In August 2003, the Panel again issued a unanimous report,
4 concluding that “the HCP/SYP/THP structure and the corresponding Watershed Analysis process
5 cannot be relied upon to meet water quality.” It further elaborated:

6 The Panel has concluded that these planning processes are unlikely, at the current
7 rate of logging, to limit sediment production sufficient to allow timely recovery of
8 the beneficial uses of water. For example, in Freshwater [Creek], the harvest and
9 road construction rates over the last five years have been extremely high and have
10 impacted a significant portion of that watershed. These activities and impacts are
11 documented in the Freshwater Watershed Analysis, a centerpiece of the HCP/SYP
12 planning process. The Panel concludes that the approval of plans generating this
13 documented level of impact constitutes a strong indication that this planning
14 process will not result in recovery of this watershed. The Panel points out that the
15 other four watersheds have also received extensive disturbance from logging.

16 100. Therefore, on-the-ground information demonstrates that the HCP and/or ITP is not
17 as effective as described in the BO and as required under the CWA. The result is that logging
18 activities pursuant to the HCP have increased and will continue to increase the amount of
19 sediment introduced to the salmon stream habitat, which has adverse effects on coho salmon,
20 chinook salmon, coastal cutthroat trout, and steelhead trout.

21 101. Similarly, the BO underestimates the significant amounts of turbidity resulting
22 from inadequate streamside buffers, which also has an adverse effect on coho. PL’s
23 implementation of THPs allowing sediment impacts to Class II and Class III streams have the
24 effect of further harming coho in ways not considered in the BO. These adverse effects require
25 reinitiation of consultation both because they were not considered in the BO and because they
show PL has exceeded the specified level of take.

 102. The new information about impacts to Bear Creek, North Fork Elk River, and

1 other watersheds also shows effects on salmon that were not previously considered, because they
2 show those watersheds will not recover as anticipated in the BO, especially in the short-term.
3 This harm to coho salmon, chinook salmon, coastal cutthroat trout, and steelhead trout habitat
4 also exceeds the specified level of take of coho salmon.

5 103. There is documented evidence showing that even if the provisions of the HCP and
6 the Aquatic Conservation Plan are strictly adhered to, they are nonetheless inadequate to protect
7 salmon and water quality. For example, the Independent Scientific Review Panel, commissioned
8 by the North Coast Regional Water Quality Control Board, noted that, “[e]ven if fully
9 implemented as envisaged, it is the Panel's judgment that the HCP/SYP/THP structure cannot be
10 relied upon to meet water quality objectives due to eight critical shortcomings.”

11 104. This information also demonstrates that the HCP and ITP are not in accordance
12 with applicable water quality standards, and are therefore in violation of the CWA.
13

14 **Pacific Lumber’s Ongoing Violations**

15 105. Since issuance of the HCP, PL has continued to violate logging practices. The
16 California Department of Forestry (“CDF”) and California Department of Fish and Game
17 (“DFG”) have cited the company with at least 325 violations of the California Forest Practices
18 Rules and its HCP in the last five years. Many of these violations resulted in serious irreparable
19 damage to fish and wildlife habitat.

20 106. Many of these violations involved PL illegally cutting trees in riparian
21 management zones (“RMZs”) by “misclassifying” streams, constructing fuel breaks, or simply
22 cutting over boundary lines.
23

24 107. RMZs are critical in providing properly functioning habitat conditions for
25 salmonids. Functions of riparian zones include: providing shade and cooler water temperatures;

1 filtering sediment, chemicals, and nutrients from upslope sources; stabilizing stream banks by
2 providing a root system on banks and floodplains; recruitment of “large woody debris,” which
3 create pools, shade, and other complex stream characteristics that salmon need. Loss of riparian
4 vegetation results in increased sediment delivery to streams from erosion on logged slopes and
5 may also destabilize streambanks, leading to increased fine sediment deposition from eroding
6 banks.

7 108. Trees and vegetation of substantial size that fall into streams and their flood areas
8 are termed “large woody debris” (LWD). Riparian zones serve as the primary source of LWD.
9 In smaller channels, woody debris limits the amount of sediment that can enter a stream by
10 trapping that sediment. It can also stabilize debris and sediment that result from landslides.
11 LWD also helps stabilize stream banks. In larger channels, wood accumulation can trigger the
12 accumulation of spawning gravel for fish, create backwaters, and cause pools to form.

13 109. Several of these violations involved logging of very large, old growth redwood
14 trees, including trees more than nine feet in diameter.

15 110. By misclassifying streams, failing to identify streams all together, and otherwise
16 cutting into “no-cut” riparian zones, PL’s logging has resulted in significant degradation of
17 watersheds that provide habitat for the federally threatened coho and chinook salmon and
18 steelhead trout.

19 111. DFG and CDF issued 31 violations to PL for “misclassifying” watercourses or
20 failing to identify watercourses all together. In these instances, streams received smaller buffers
21 than required, or no buffers at all. For example, in Shaw Creek Grove, PL misclassified a stream
22 as one not supporting aquatic life (Class III). When DFG discovered the error, trees had already
23 been felled in an area that properly should have been a “no-cut” zone. Large, old trees that are
24
25

1 crucial in protecting streams from excessive sedimentation, including one measuring 8 feet in
2 diameter, were cut in this “no-cut” zone.

3 112. PL received 35 violations for other illegal cutting in riparian areas, with logging in
4 the “no-cut” zones and cutting more than allowed in “selective entry bands.” For instance, in the
5 Eel River watershed, DFG found that two ancient redwoods were cut within what should have
6 been a “no-cut” zone. One stump measured nine feet in diameter while the other measured six
7 feet in diameter.

8 113. The number and nature of these violations suggests that it is no accident that they
9 are occurring and that the largest trees are falling. For example, in issuing one violation, DFG
10 noted that “[b]lue flagging, which is used to demark a Class III watercourse, was hanging four
11 feet from the tree stump.”
12

13 114. Two hundred forty one of the 325 violations, or approximately 75%, resulted in
14 degraded water quality. Twenty-three of those violations were issued because logging
15 operations created large areas of exposed soil next to streams that were left untreated. Forty-six
16 violations were issued for stream crossings, with many of these noting concern at multiple
17 locations. These actions results in significant soil erosion and sedimentation. Sedimentation can
18 have devastating impacts to salmonids.

19 115. Twenty-six of the 325 violations involved illegal logging operations within
20 marbled murrelet habitat.

21 116. Fourteen of these violations involved unlawful logging in northern spotted owl
22 habitat.
23

24 117. This systematic pattern of violation correspondence to PL’s general practice of
25 violating the spirit as well as the letter of the HCP and ITP. Since approval of the HCP and

1 issuance of the ITP by Federal Defendants, PL has engaged in accelerated and concentrated
2 intensive timber harvesting of the prime old growth and residual stands within its lands covered
3 by the HCP. On information and belief, PL's accelerated and intensified program of timber
4 harvesting has resulted in a higher level of take of the marbled murrelet and its habitat, and of
5 coho salmon and its habitat, than was considered or provided for in the BO, HCP, or ITP. PL's
6 accelerated logging of the remaining old growth stands on its lands also has contributed to and
7 exacerbated the degradation of water quality in the affected watercourses.

8
9 **FIRST CAUSE OF ACTION (Against Federal Defendants)**
10 **VIOLATION OF THE ENDANGERED SPECIES ACT**
11 **Failure to Reinitiate Consultation**

12 118. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

13 119. Federal Defendants are in violation of Section 7 (a)(2) of the ESA and the APA by
14 failing to ensure through initiation or reinitiation of formal consultation that the effects of PL's
15 timber operations carried out pursuant to its HCP and ITP are not likely to jeopardize the
16 continued existence of the marbled murrelet, coho salmon, chinook salmon, steelhead trout, and
17 coastal cutthroat trout, or adversely modify their critical habitats. 16 U.S.C. § 1536(a)(2); 50
18 C.F.R. § 402, 5 U.S.C. § 706.

19 120. Federal Defendants have maintained involvement and control over the provisions
20 of the HCP and are also independently authorized under law to require reinitiation of
21 consultation. The HCP contains numerous provisions authorizing NOAA Fisheries and FWS
22 involvement and control over PL land management practices, including participation in the
23 development of new standards, veto power over proposed activities, and actual selection of
24 watershed site prescriptions. The Pacific Lumber HCP is a multi-species plan where a focus on
25 certain species is intended to inure to the benefit of all covered species.

1 121. Federal involvement in managing the effects of the PL HCP on covered species is
2 also authorized by law, above and beyond that involvement described in the HCP. First, federal
3 agencies have the ability to take remedial conservation actions outside of PL's property in
4 response to new information about the effect of the HCP on covered species. See 63 Fed. Reg.
5 8,859, 8,862 (1998). Second, both FWS and NOAA Fisheries are authorized by law to impose
6 additional requirements upon PL. See, e.g., 50 C.F.R. § 17.32(b)(6). Finally, both NOAA
7 Fisheries and FWS are authorized by law to revoke the ITP for PL, either through general
8 permitting authority or through specific authority. See, e.g., 50 C.F.R. § 17.32(b)(8); 64 Fed.
9 Reg. 32,706, 32,709 (1999).

10
11 122. The agency "shall" reinitiate formal consultation with FWS "(b) If new
12 information reveal effects of the action that may affect listed species or critical habitat in a
13 manner or to an extent not previously considered; (c) If the identified action is subsequently
14 modified in a manner that causes an effect to the listed species or critical habitat that was not
15 considered in the biological opinion...." 50 C.F.R. §§ 402.16(b) and 402.16(c). The facts
16 outlined constitute new information which reveals that the marbled murrelets, coho salmon,
17 chinook salmon, coastal cutthroat trout, and steelhead trout may be affected in a manner and/or
18 to an extent not previously considered.

19 123. Federal Defendants' failure to reinitiate consultation constitutes an ongoing
20 violation of the ESA and APA and an evasion of their important non-discretionary duties. 16
21 U.S.C. § 1536(a)(2); 50 C.F.R. § 402, 5 U.S.C. §§ 701-706.

22
23 **SECOND CAUSE OF ACTION (Against Federal Defendants)**
24 **VIOLATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT**
25 **Failure to Prepare Supplemental EIS**

124. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

1 125. NEPA requires an agency to prepare a supplement to its NEPA document if the
2 agency makes substantial changes in the proposed action that are relevant to environmental
3 concerns. 40 C.F.R. §1502.9(c)(1)(i).

4 126. Federal agencies must also prepare supplements to either draft or final EIS's if
5 there "are significant new circumstances or information relevant to environmental concerns and
6 bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9 (c)(1)(ii).

7 127. The Federal Defendants continue to sanction activities pursuant to the HCP.

8 128. The Federal Defendants have violated NEPA because the agency has failed to
9 supplement the EIS for the HCP despite the fact that PL is managing the land inconsistent with
10 the HCP.

11 129. The Federal Defendants are also required to supplement the EIS because there is
12 significant new information, as outlined in the Factual Background Section above, concerning
13 environmental impacts being imposed by PL's timber operations.

14 130. For example, water quality standards have been violated on a habitual basis and
15 this constitutes significant new information which "presents a seriously different picture of the
16 likely environmental consequences of the proposed action not adequately envisioned by the
17 original EIS." See Wisconsin v. Weinberger, 745 F.2d 412, 420 (7th Cir. 1984).

18 131. The continual, systematic violation of water quality standards due to PL's timber
19 operations since the approval of the HCP and ITP is reflected in the litany of non-concurrences
20 and objections filed by the California Regional Water Quality Control Board for Region No. 1
21 (North Coast) in response to THPs filed by PL.

22 132. Further, the North Coast Regional Water Quality Control Board Staff Report
23 includes new information concerning the HCP's contribution to further degrading of water
24
25

1 quality. The Staff Report also indicates that coho salmon are being adversely impacted in a
2 manner not previously considered.

3 133. Additionally, an independent Scientific Review Panel released reports examining
4 the prescriptions and protections of the HCP (and SYP/THP process) and their effectiveness in
5 limiting sediment production and allowing for the recovery of the beneficial uses in five
6 impacted watersheds. The Panel concluded that “the HCP/SYP/THP structure and the
7 corresponding Watershed Analysis process cannot be relied upon to meet water quality.”
8

9 134. New information concerning impacts to murrelets constitutes significant new
10 information. Oil spills have had a greater impact on marbled murrelets than expected by the BO.
11 Murrelets are not using some of the conserved habitat established in the HCP that the BO
12 anticipated would be used. FWS has underestimated the extent of take. Fewer murrelet exist
13 across their entire population range than previously believed. Additionally, a May of 2004, a
14 scientific report commissioned by FWS was released that shows that the marbled murrelets faces
15 a 100% probability of extinction in California in the next 40 years under current management
16 regimes.

17 135. Additionally, the Statement of Decision in EPIC v. California Department of
18 Forestry and Fire Protection; California Department of Fish and Game; and Pacific Lumber
19 Company, CV 990445 (July 22, 2003), by Judge John J. Golden of the Superior Court of
20 California, Humboldt County (“Statement of Decision”), concerning Pacific Lumber’s
21 HCP/Sustained Yield Plan (“SYP”) constitutes significant new information. The Statement of
22 Decision makes several findings concerning California Department of Fish and Game’s
23 (“CDFG”) and California Department of Forestry and Fire Protection’s (“CDF”) state approval
24 of the HCP and accompanying state NEPA document. The Court found that the SYP is fatally
25

1 flawed in its format, content and processing and that if PL is to successfully prosecute the
2 submission of an SYP, the process must begin anew. PL has not restarted the process.
3 Specifically, the court found, among other things, that the ITP (1) failed to fully mitigate all
4 impacts to the marbled murrelet; (2) improperly authorized take of unlisted species; (3) illegally
5 authorized take of northern spotted owls; and (4) violates the public trust doctrine.

6 136. Furthermore, the CDF and CDFG have charged PL with at least 325 violations of
7 the California Forest Practices Rules and its HCP in the last five years.

8 137. Numerous pieces of significant new information have come to light requiring
9 preparation of a supplemental EIS.

10 138. The Federal Defendants' actions were taken not in accordance with the law,
11 without observance of procedures required by law, and are arbitrary and capricious within the
12 meaning of the APA. 5 U.S.C. §§ 701-706.

13
14 **THIRD CAUSE OF ACTION (Against Federal Defendants)**
15 **VIOLATION OF THE CLEAN WATER ACT**
16 **Violation of CWA Water Quality Standards and Antidegradation Policy**

17 139. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

18 140. The Clean Water Act requires each state to develop and implement water quality
19 standards to protect and enhance the quality of water within the state. 33 U.S.C.
20 §§1311(b)(1)(C); 1313(c)(2)(A). State water quality standards must set forth the designated uses
21 of the relevant waters. 33 U.S.C. § 1313(c)(2)(A). The North Coast Regional Water Quality
22 Control Board has been delegated the authority to promulgate water quality standards for the
23 region in question.

24 141. Section 303 of the Clean Water Act also contains an antidegradation policy. 33
25 U.S.C. § 1313. The antidegradation policy provides that "[e]xisting instream water uses and the

1 level of water quality necessary to protect the existing uses shall be maintained and protected.”
2 40 C.F.R. § 131.12 (a). The "Tier 1" protection of the antidegradation policy constitutes the
3 minimum level of protection that must be afforded to all waters. The Environmental Protection
4 Agency interprets this level of protection to mean "[n]on-aberrational resident species must be
5 protected, even if not prevalent in number or importance. Water quality should be such that it
6 results in no mortality and no significant growth or reproductive impairment of resident species.
7 Any lowering of water quality below this full level of protection is not allowed An existing
8 aquatic community composed entirely of invertebrates and plants, such as may be found in a
9 pristine alpine tributary stream, should still be protected whether or not such a stream supports a
10 fishery." Water Quality Standards Handbook: Second Edition, U.S. EPA, August 1994.

12 142. The "Tier 2" level of the antidegradation policy provides protection for those
13 waterbodies that have water quality exceeding that necessary to support the propagation of fish,
14 shellfish and wildlife and recreation in and on the water. 40 C.F.R. § 131.12(a)(2). These waters
15 cannot be degraded unless there is a full antidegradation review that includes extensive public
16 involvement and which finds it is necessary to degrade the water to accommodate important
17 economical or social development. *Id.* In allowing such degradation or lowering of water
18 quality to occur, "the state shall assure that there shall be achieved . . . all cost-effective and
19 reasonable best management practices for nonpoint source control." *Id.* Even so, when a
20 determination is made that degrades water quality in these waters, the existing uses, including
21 those that exceed the "fishable/swimmable" standard, must be fully protected and may not be
22 degraded in any circumstance.

24 143. The highest level of protection afforded by the antidegradation policy is for "high
25 quality waters [that] constitute an outstanding National resource, such as waters of National and

1 State parks and wildlife refuges and waters of exceptional recreational or ecological
2 significance." 40 C.F.R. § 131.12(a)(3). Referred to as "Tier 3" protection, this section states
3 that water of this exceptional quality "shall be maintained and protected." 40 C.F.R. §
4 131.12(a)(3).

5 144. The CWA requires all federal agencies to comply with both state water quality
6 standards and the antidegradation policy. 33 U.S.C. §§ 1313, 1323.

7 145. Federal Defendants have failed to comply with the CWA because the agencies
8 have approved an HCP that contains provisions and directives, including an Aquatic
9 Conservation Plan, and an ITP that fail to adequately maintain or protect the benefits that plants,
10 invertebrates, amphibians, mammals, fish, birds, humans, and others derive from the watersheds
11 at issue, in violation of 33 U.S.C. §§ 1251(a), 1288(b), and 1313; 40 C.F.R. § 131.12(a). Federal
12 Defendants' failure to comply with state water quality standards and the antidegradation policy
13 has been verified by on-the-ground implementation of the Federal Defendants' decisions, which
14 has resulted in many water quality violations.
15

16 146. Federal Defendants' violation of the antidegradation policy has been and
17 continues to be aggravated by the fact that PL has made a concerted effort since the HCP and
18 ITP were approved to accelerate and intensify timber harvesting in its remaining old growth and
19 residual stands. By logging what is left of the old growth on its lands in so short a time, PL's
20 timber harvesting program is having significant harmful effects on and contributing to the
21 degradation of water quality in watercourses and watersheds covered by the HCP.
22

23 147. Additionally, some of the watercourses subject to the HCP are of exceptional
24 recreational and/or ecological significance, including those that flow through Grizzly Creek State
25 Park (Grizzly Creek, Stevens Creek and the Van Duzen River); Humboldt County Parks such as

1 Cheatem Grove, Pamplin Grove, and Swimmer's Delight (Van Duzen River); Humboldt
2 Redwood State Park (Eel River and tributaries); and Headwaters Forest Reserve (South Fork Elk
3 River), and those that are designated as Wild and Scenic Rivers (Van Duzen River and Eel
4 River). These waters are outstanding national resources, elevating the necessary protection to
5 that afforded by the Tier III classification. Federal Defendants have failed, through authorization
6 of the HCP and ITP, to ensure that the exceptional water quality of these waters be maintained
7 and protected.

8
9 148. Federal Defendants cannot approve an HCP or ITP that does not achieve
10 compliance with federal and state water quality standards and requirements and the
11 antidegradation policy. 33 U.S.C. § 1323.

12 149. By approving the HCP and ITP, Federal Defendants have authorized a 50-year
13 logging plan which has and will continue to cause violations of water quality standards and the
14 antidegradation policy, in violation of 33 U.S.C. § 1313.

15 150. In the approval process, Federal Defendants failed to analyze whether the
16 permitted activities under the HCP and ITP would violate water quality standards and the
17 antidegradation policy in the Delta, Main Fork and South Fork of the Eel River, the Elk River,
18 Freshwater Creek, Mad River, Mattole River, and Van Duzen River. Portions of all these rivers
19 are listed as water quality limited segments for elevated temperature and/or
20 sedimentation/siltation and/or turbidity pursuant to the Clean Water Act. 33 U.S.C. § 1313(d).
21 These waterbodies are therefore more susceptible to degradation due to the activities approved in
22 both the HCP and ITP and are entitled to even greater protection under the antidegradation
23 policy.
24

25 151. Federal Defendants' approval of the HCP and ITP violates the Clean Water Act,

1 33 U.S.C. § 1251 et seq., and its implementing regulations.

2 152. Federal Defendants' actions and omissions in approving the HCP and ITP are
3 arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law, and
4 therefore, violate the APA, 5 U.S.C. §§ 701-706.

5 **FOURTH CAUSE OF ACTION (Against Defendant PL and Federal Defendants)**
6 **VIOLATION OF THE ENDANGERED SPECIES ACT**
7 **Irreversible and Irretrievable Commitment of Resources**

8 153. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

9 154. FWS, NOAA Fisheries, and PL are causing an irreversible and irretrievable
10 commitment of resources in violation of section 7(d) of the ESA. 16 U.S.C. § 1536(d). After
11 initiation of consultation under Section 7(a)(2), "the Federal agency and the permit or license
12 applicant shall not make any irreversible or irretrievable commitment of resources with respect
13 to the agency action which has the effect of foreclosing the formulation or implementation of any
14 reasonable and prudent alternative measures which would not violate [Section 7(a)(2)]." Id.

15 155. Because FWS and NOAA Fisheries should already have reinitiated consultation
16 regarding the HCP's impacts on marbled murrelet and coho salmon, the duty to prevent any
17 irreversible or irretrievable commitment already has been triggered and is being violated because
18 the federal agencies are allowing, and PL is proceeding with logging and other activities in the
19 covered species' habitat that have resulted and will continue to result in illegal, irreversible
20 commitment of resources, illegal take of those listed species, and illegal preclusion of the
21 formulation or implementation of reasonable and prudent alternative measures.

22 156. The Defendants' continued allowance of logging under the HCP is therefore
23 arbitrary, capricious, and not in accordance with procedures required by law, in violation of the
24 ESA, 16 U.S.C. § 1536(d), and the APA at 5 U.S.C. §§ 701- 706.
25

1 **FIFTH CAUSE OF ACTION- (Against Federal Defendants)**
2 **VIOLATION OF THE ENDANGERED SPECIES AND ADMINISTRATIVE**
3 **PROCEDURE ACTS**

4 **Failure to Use Best Scientific and Commercial Data Available**

5 157. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

6 158. Section 7(a)(2) of the Endangered Species Act requires that Federal Defendants'
7 Biological Opinion, Habitat Conservation Plan, and Incidental Take Permit ensure that the
8 proposed activities are not likely to jeopardize the continued existence of an endangered or
9 threatened species and that those activities will not result in the destruction or adverse
10 modification of the designated critical habitat of the listed species, and that in making those
11 determinations Federal Defendants use the best scientific and commercial data available. 16
12 U.S.C. § 1536(a)(2).

13 159. At the time the Federal Defendants considered and approved the BO, HCP, and
14 ITP, the best scientific and commercial data available indicated that the proposed action would
15 jeopardize the continued survival and the recovery of listed species, including the marbled
16 murrelet. Federal Defendants did not adequately consider and did not base their jeopardy
17 determinations regarding listed species, including the marbled murrelet, on the best scientific and
18 commercial data available.

19 160. At the time the Federal Defendants considered and approved the BO, HCP, and
20 ITP, the best scientific and commercial data available further indicated that the proposed action
21 would result in the destruction or adverse modification of designated critical habitat of listed
22 species, including the marbled murrelet. Federal Defendants did not adequately consider and did
23 not base their determination regarding the destruction or adverse modification of critical habitat
24 of listed species, including the marbled murrelet, on the best scientific and commercial data
25

1 available.

2 161. In addition, Federal Defendants failed to use the best available scientific and
3 commercial data in assessing the availability of measures that could minimize and mitigate the
4 harmful impacts of the permitted activities on listed species, including the marbled murrelet. At
5 the time Federal Defendants considered and approved the BO, HCP, and ITP, the best scientific
6 and commercial data available indicated that Defendant PL's proposed mitigation measures
7 would not be as effective as other available mitigation measures at safeguarding the survival and
8 recovery of the listed species, including the marbled murrelet. Federal Defendants did not
9 adequately consider and did not base their approval of Defendant PL's proposed mitigation
10 measures on that data.
11

12 162. Federal Defendants also failed to use the best available scientific and commercial
13 data in assessing the full availability of measures that could minimize and mitigate the
14 destruction or adverse modification of critical habitat resulting from the permitted activities. At
15 the time Federal Defendants considered and approved the BO, HCP, and ITP, the best scientific
16 and commercial data available indicated that Defendant PL's proposed measures would not be as
17 effective as other available measures for minimizing and mitigating the destruction or adverse
18 modification of critical habitat resulting from the permitted activities. Federal Defendants did
19 not adequately consider and did not base their approval of Defendant PL's proposed mitigation
20 measures on the best scientific data available.
21

22 163. The best scientific and commercial data that has been available since the Federal
23 Defendants' approval of the BO, HCP, and ITP – as reflected, for example, in the Evaluation
24 Report for the 5-Year Status Review of the Marbled Murrelet – confirm that the BO, HCP, and
25 ITP were based on an erroneous determination that the proposed actions would not jeopardize

1 listed species, including the marbled murrelet. These data also confirm that Federal Defendants'
2 erroneous jeopardy determination was the result of Federal Defendants' failure to use the best
3 available scientific and commercial data, and that the activities covered by the BO, HCP, and
4 ITP are jeopardizing the survival and recovery of listed species, including the marbled murrelet.
5 Similarly, the best available data since Federal Defendants' approval of the BO, HCP and ITP
6 confirm that the mitigation measures considered and adopted by the Services have been
7 ineffectual at protecting listed species, including the marbled murrelet.

8
9 164. The best scientific and commercial data that has been available since Federal
10 Defendants' approval of the BO, HCP, and ITP – as reflected, for example, in the Evaluation
11 Report for the 5-Year Status Review of the Marbled Murrelet – confirm that the BO, HCP, and
12 ITP were based on an erroneous determination concerning the destruction or adverse
13 modification of critical habitat of listed species, including the marbled murrelet. These data also
14 confirm that Federal Defendants' erroneous destruction or adverse modification determination
15 was the result of Federal Defendants' failure to use the best available scientific and commercial
16 data, and that the activities covered by the BO, HCP, and ITP are resulting in the destruction or
17 adverse modification of the critical habitat for listed species, including the marbled murrelet.
18 Similarly, the best data available since Federal Defendants' approval of the BO, HCP, and ITP
19 confirm that the mitigation measures considered and adopted by Federal Defendants have been
20 ineffectual at minimizing and mitigating the destruction or adverse modification of critical
21 habitat.

22
23 165. Federal Defendants' approval of the BO, HCP, and ITP thus was not based on,
24 and in fact contradicted, the best available scientific and commercial data concerning the impacts
25 of the activities covered by the BO, HCP, and ITP on the survival and recovery of species listed

1 as endangered or threatened under the Endangered Species Act, including the marbled murrelet,
2 in violation of 16 U.S.C. § 1536(a)(2). By the same token, Federal Defendants' approval of the
3 BO, HCP, and ITP was not based on, and in fact contradicted, the best available scientific and
4 commercial data concerning the likelihood that the covered activities would result in destruction
5 or adverse modification of critical habitat of listed species, including the marbled murrelet, in
6 violation of 16 U.S.C. § 1536(a)(2). Federal Defendants' approval of the BO, HCP, and ITP also
7 was not based on the best available data concerning the efficacy of available measures to
8 minimize and mitigate the impacts of covered activities on listed species, including the marbled
9 murrelet, and to minimize and mitigate the destruction or adverse modification of critical habitat
10 resulting from covered activities, again in violation of 16 U.S.C. § 1536(a)(2).
11

12 166. Accordingly, Federal Defendants' approval of the BO, HCP and ITP was
13 arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in violation
14 of 5 U.S.C. § 706(2)(A).
15

16 **SIXTH CAUSE OF ACTION (Against Federal Defendants)**
17 **VIOLATION OF THE ENDANGERED SPECIES AND ADMINISTRATIVE**
18 **PROCEDURE ACTS**
19 **Failure to Find Applicant Would to the Maximum Extent Practicable**
20 **Minimize and Mitigate Take**
21

22 167. Plaintiffs reallege and incorporate by reference all preceding paragraphs.
23

24 168. Section 10(a)(2)(B) of the Endangered Species Act requires Federal Defendants to
25 make several findings when issuing an ITP. Among those findings, Federal Defendants must
find that the applicant will, to the maximum extent practicable, minimize and mitigate the
impacts of such taking. 16 U.S.C. § 1539(a)(2)(B)(ii). Consequently, Federal Defendants were
obliged to find independently that no practicable alternative to Defendant Pacific Lumber's
development plan would minimize the taking of listed species, including marbled murrelets.

1 Federal Defendants failed to make this requisite finding.

2 169. Federal Defendants acknowledged that the most conservative approach to
3 managing non-federal lands for the benefit of murrelets would be to protect all occupied habitat.
4 But after dismissing that option as impracticable, while alluding briefly to the need to make a
5 finding that incidental take will be mitigated and minimized to the maximum extent practicable,
6 Biological Opinion 401-02, Federal Defendants failed to make the required finding that
7 Defendant Pacific Lumber would minimize the impacts of the taking of listed species, including
8 marbled murrelets, "to the maximum extent practicable."
9

10 170. Federal Defendants' authorization of the ITS/ITP without making the requisite
11 finding that the covered activities would minimize and mitigate the taking of listed species,
12 including marbled murrelets, to the maximum extent practicable violates 16 U.S.C. §
13 1539(a)(2)(B)(ii) and is arbitrary, capricious, an abuse of discretion, or otherwise not in
14 accordance with law in violation of 5 U.S.C. § 706(2)(A).

15 **SEVENTH CAUSE OF ACTION (Against Defendant PL and Federal Defendants)**
16 **VIOLATION OF THE ENDANGERED SPECIES ACT**
17 **Unlawful Take of Marbled Murrelet and Coho Salmon**

18 171. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

19 172. Section 9 of the Endangered Species Act prohibits any person, including any
20 federal agency or private corporation, from "taking" or allowing "take" of a listed species unless
21 such take has been authorized in an incidental take statement issued pursuant to section 7(b)(4)
22 or an incidental take permit issued pursuant to section 10(a)(2) of the ESA. 16 U.S.C. §
23 1538(a)(2).

24 173. Section 9 also prohibits any person from soliciting another person to commit
25 unauthorized take of a listed species. 16 U.S.C. § 1538(g).

1 174. As alleged in the Fifth and Sixth Causes of Action, the BO, HCP and ITP
2 purporting to cover the activities of Defendant Pacific Lumber, its subsidiaries and contractors
3 that has caused and continues to cause take of marbled murrelet and coho salmon are invalid
4 because they do not comply with sections 7 and 10 of the ESA, 16 U.S.C. §§ 1536, 1539, and
5 were approved by the Federal Defendants in violation of the Administrative Procedure Act, 5
6 U.S.C. § 706(2)(A).

7 175. As alleged in the First Cause of Action, the BO, HCP and ITP also are invalid, and
8 the Federal Defendants are in violation of their duty under section 7 of the ESA to reinstate
9 consultation, because of new information that reveals that the listed species, including marbled
10 murrelet and coho salmon, may be effected by the covered activities in a manner or to an extent
11 not previously considered.

12 176. Pursuant to section 10 of the ESA, the Federal Defendants are required to revoke
13 the ITP if they find that the permittee is not complying with the terms and conditions of the
14 permit. 16 U.S.C. § 1539(a)(2)(C). As alleged in paragraphs 105 – 117 of this Complaint,
15 Defendant PL has committed hundreds of violations of state law, the ESA, and the terms and
16 conditions of the HCP and ITP since the HCP and ITP were approved. Accordingly, the ITP is
17 no longer valid and must be revoked.

18 177. Upon information and belief, Plaintiffs believe that since February 1999, when the
19 Federal Defendants approved and issued the BO, HCP and ITP at issue in this case, Defendant
20 Pacific Lumber, and contractors used by Pacific Lumber to conduct covered activities, have
21 taken and continue to take both marbled murrelets and coho salmon by conducting timber
22 harvesting activities on lands covered by the HCP and ITP which have resulted and continue to
23 result in significant habitat modification or degradation that significantly impairs essential
24
25

1 behavioral patterns of marbled murrelets and coho salmon.

2 178. On April 3, 2002, pursuant to the 60-day notice requirement of the citizen suit
3 provision of the ESA, Plaintiff EPIC sent to Defendants, by certified mail, written notice of
4 intent to sue for violations of sections 7 and 9 of the ESA, including illegal take of marbled
5 murrelet and coho salmon.

6 179. Defendant Pacific Lumber's acts and omissions in taking marbled murrelet and
7 coho salmon, and Federal Defendants' acts and omissions in allowing that take to occur, violate
8 section 9 of the Endangered Species Act. 16 U.S.C. § 1538(a)(1)(B); 50 C.F.R. § 17.3.

9
10 **EIGHTH CAUSE OF ACTION (Against Defendant FWS)**
11 **VIOLATION OF THE ENDANGERED SPECIES AND ADMINISTRATIVE**
12 **PROCEDURE ACTS**
13 **Issuance of Incidental Take Permit for Northern Spotted Owl Violates State Law**

14 180. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

15 181. The Federal Defendants are prohibited from authorizing incidental take through
16 incidental take statements or incidental take permits if the proposed activity would be otherwise
17 unlawful under state or federal law. 16 U.S.C. §§ 1536(b)(3)-(4); 1539(a)(1)(B); 50 C.F.R. §§
18 402.02, 402.14(i).

19 182. The FWS determined that an undetermined number of northern spotted owls could
20 be taken as a result of activities taken under the HCP/SYP. BO at 408. Although FWS failed to
21 quantify the amount of take that it authorized, over the 50-year HCP period, the loss of at least
22 48 activity centers, harassment of at least 156 activity centers due to disturbance during the
23 breeding season, and an undetermined number of deaths and injuries are expected. *Id.*

24 183. However, no take, whatsoever, of northern spotted owls can be authorized
25 pursuant to state law. California Fish and Game Code Section 3503.5. Section 3503.5 (bird-of-

1 prey prohibition) states that:

2 It is unlawful to take, possess, or destroy any birds in the orders
3 Falconiformes or Strigiformes (birds-of-prey) or to take, possess, or destroy the
4 nest or eggs of any such bird except as otherwise provided by this code or any
regulation adopted pursuant thereto.

5 184. FWS authorization of incidental take of NSOs is in violation of the ESA because
6 the proposed activity for which the ITS/ITP was granted is not an otherwise lawful activity under
7 California state law. Section 3503.5 explicitly prohibits destruction of NSOs, their nests, or their
8 eggs. FWS has specifically authorized PL to destroy 48 activity centers and allowed for
9 harassment of at least 156 activity centers.

10 185. Federal Defendants' ITP is therefore arbitrary and capricious, an abuse of
11 discretion, and not in accordance with law, in violation of the Secretary's duties under the ESA.
12 16 U.S.C. §§ 1536(a)(2), 1539(a)(1)(B) and 5 U.S.C. 706(2)(A).

13 **NINTH CAUSE OF ACTION (Against Defendant PL)**
14 **Violation of California Business and Professions Code Section 17200 et seq.—Unlawful**
15 **Business Practices**

16 186. The preceding paragraphs of this complaint are incorporated by reference as
17 though fully set forth herein.

18 187. Defendant PL has committed hundreds of violations of the California Forest
19 Practice Act, California Forest Practice Rules, the ESA, the HCP, and its ITP, thereby violating
20 Sections 7 and 10 of the ESA and its implementing regulations, and Title 14 of the California
21 Code of Regulations sections 913, 914, 916, 923, 1035, 1039, in the course of their business
22 operations. These violations constitute unlawful business acts or practices under Business and
23 Professions Code section 17200, and Defendant PL is subject to the relief provided by section
24 17200 et seq.
25

1 188. Plaintiffs, their members and staff, other persons in interest, and the general public
2 have been injured by defendants' acts of unfair competition. These violations are continuing and
3 will continue unless enjoined by this Court.

4 **TENTH CAUSE OF ACTION (Against Defendant PL)**
5 **Violation of California Business and Professions Code Section 17200 et seq.—Unlawful**
6 **Business Practices**

7 189. The preceding paragraphs of this complaint are incorporated by reference as
8 though fully set forth herein.

9 190. Defendant PL has committed hundreds of violations of the California Forest
10 Practice Act, California Practice Rules, the ESA, the HCP, and the ITP, thereby violating
11 Sections 7 and 10 of the ESA and its implementing regulations, and Title 14 of the California
12 Code of Regulations sections 913, 914, 916, 923, 1035, 1039.

13 191. As well as being unlawful, defendants' actions are unfair business acts or practices
14 because they significantly threaten or harm competition. A defendant that conducts illegal
15 activities from which it profits is competing unfairly against its competitors who use lawful
16 means to produce their products and services. Here, Defendant PL profit from their illegal
17 logging in violation of federal and state laws, and their profits are amplified because they have
18 avoided the costs of complying with federal and state laws. Their profits have been further
19 amplified because, in addition to revenue from timber sales, they have received land and
20 substantial amounts of taxpayer money from the federal and state governments as part of the
21 Headwaters Agreement on the condition that they would log only in conformance with the HCP
22 and all other applicable laws and regulations. Their competitors in the timber market who log
23 timber in compliance with state and federal environmental laws are at a competitive
24 disadvantage because they incur and internalize the substantial costs of environmental
25

1 compliance as defendants do not.

2 192. Plaintiffs, their members and staff, other persons in interest, and the general public
3 have been injured by Defendant PL's acts of unfair competition. These violations are continuing
4 and will continue unless enjoined by this Court.

5 **ELEVENTH CAUSE OF ACTION (Against Defendant PL)**
6 **Violation of California Business and Professions Code Section 17200 et seq.—Unfair,**
7 **Deceptive, Untrue or Misleading Advertising**

8 193. The preceding paragraphs of this complaint are incorporated by reference as
9 though fully set forth herein.

10 194. Defendant PL has committed hundreds of violations of the California Forest
11 Practice Act and California Forest Practice Rules, the ESA, the HCP, and the ITP, thereby
12 violating Sections 7 and 10 of the ESA and its implementing regulations and Title 14 of the
13 California Code of Regulations sections 913, 914, 916, 923, 1035, 1039.

14 195. Despite Defendant PL's hundreds of violations, they falsely advertise themselves
15 to the public as responsible environmental stewards who practice sustainable forestry in
16 compliance with all applicable environmental laws and regulations.

17 196. For example, Pacific Lumber's website states, "Environmental sustainability is a
18 commitment to the ecosystem and the forest, streams, fish and wildlife that are part of it. In
19 addition, it is a commitment to our customers, our employees, and our business partners that we
20 are following laws and regulations, using resources wisely, recycling, and reducing pollution."

21 *See* <http://palco.com/commitment_sustain_environ.cfm> (emphasis added).
22

23 197. Further, Defendant PL has carried out an advertising campaign with many
24 deceptive and misleading statements. As one example, PL produced an advertisement that
25 appeared in the *Eureka Times Standard* that stated:

1 Anti-timber activists are spinning modern-day myths as part of their obsessive
2 campaign against [Pacific Lumber], telling wild tales of some horrible beast that
3 ravages the land, defiles the water, and murders fish in their beds. But the power
4 of myth, ancient or modern, can never stand up to the facts.

5 A separate advertisement, also printed in the *Eureka Times Standard*, made the claim that:

6 In [Pacific Lumber's] forests, streams with fish are bordered by lush natural
7 buffers, some as wide as a football field with the stream running through the 50-
8 yard line. In these buffers, trees and vegetation are preserved to keep streams cool
9 and clear. [Pacific Lumber] even protects streams without fish. In fact, roughly
10 half of [Pacific Lumber] land is currently off-limits to harvest for the protection of
11 fish and wildlife habitat....

12 Another newspaper advertisement stated:

13 ...[S]ustainable forestry—It's what has kept us in business for more than 140
14 years. In fact, [Pacific Lumber's] harvest practices have been certified by the
15 Sustainable Forestry Initiative program, a national organization dedicated to
16 sustainable forestry.

17 Defendants also promulgated similarly misleading radio and television advertisements that began
18 airing on Humboldt County stations in 2003, including, but not limited to, commercials on
19 KHUM and KSLG, among other radio stations, and Channels 3 (KIEM) and 29 (FOX).

20 Together and separately, these and other advertisements from PL are designed to create a false
21 image of the company, an attempt to deceive others into believing that it is a responsible steward
22 of the environment.

23 198. Defendant PL also misleads the public by advertising its lumber under the so-
24 called "Sustainable Forestry Initiative" (SFI) program. Under the SFI program, PL falsely
25 represents that it complies with all of the following in conducting its timber harvesting
operations:

3.1 Sustainable Forestry - To practice sustainable forestry to meet the needs of the
present without compromising the ability of future generations to meet their own
needs by practicing a land stewardship ethic that integrates the reforestation,
managing, growing, nurturing and harvesting of trees for useful products with the

1 conservation of soil, air and water quality, biological diversity, wildlife and
2 aquatic habitat, recreation and aesthetics.

3 3.2 Responsible Practices - To use in forests, and promote among other forest
4 landowners, sustainable forestry practices that are economically, environmentally
5 and socially responsible.

6 3.3 Forest Health and Productivity - To protect forests from wildfire, pests,
7 diseases and other damaging agents to maintain and improve long-term forest
8 health and productivity.

9 3.4 Protecting Special Sites - To manage forests and lands of special significance
10 (e.g., biologically, geologically, culturally or historically significant) in a manner
11 that takes into account their unique qualities.

12 3.5 Legal Compliance - To comply with applicable federal, state or local forestry
13 and related environmental laws and regulations.

14 Sustainable Forestry Initiative's Standard and Verification Procedures, 2002 – 2004 edition.

15 199. These representations are false, deceptive, untrue, unfair, and misleading because
16 Defendant PL has violated and continues to violate applicable laws and regulations, including,
17 but not limited to, the California Forest Practice Act, California Forest Practice Rules,
18 Endangered Species Act, and the Code of Federal Regulations. Further, these violations
19 demonstrate that Defendant PL is not economically, environmentally, and/or socially
20 responsible, and has caused significant adverse impacts on fish, wildlife, water quality, forest
21 health and productivity, and lands of special significance.

22 200. By these representations and otherwise, PL's marketing of its timber misleads
23 consumers into believing erroneously that PL's timber is an environmentally responsible "green"
24 product.

25 201. At the same time, in order to comply with the terms of its junk bond financing, PL
has been dumping its falsely labeled lumber on the market at prices below the cost of production
of its competitors who produce "green" lumber that truly has been harvested by sustainable and

1 ecologically responsible methods.

2 202. By these acts, Defendant PL has engaged in unfair, deceptive, untrue, or
3 misleading advertising within the meaning of Section 17200.

4 203. Plaintiffs, their members and staff, other persons in interest, and the general
5 public have been injured by Defendant PL's acts of unfair competition. These violations are
6 continuing and will continue unless enjoined by this Court.

7 **TWELFTH CAUSE OF ACTION (Against Defendant PL)**
8 **Violation of California Business and Professions Code Section 17200 et seq.—Fraudulent**
9 **Business practices**

10 204. The preceding paragraphs of this complaint are incorporated by reference as
11 though fully set forth herein.

12 205. The deceptive, untrue, unfair, and misleading statements and advertising made by
13 Defendant Pacific Lumber described above are fraudulent business practices within the meaning
14 of Section 17200.

15 206. Plaintiffs, their members and staff, other persons in interest, and the general public
16 have been injured by Defendant PL's acts of unfair competition. These violations are continuing
17 and will continue unless enjoined by this Court.

18 **THIRTEENTH CAUSE OF ACTION (Against Defendants PL)**
19 **Violation of California Business and Professions Code Section 17500 et seq.—False**
20 **Advertising**

21 207. The preceding paragraphs of this complaint are incorporated by reference as
22 though fully set forth herein.

23 208. Defendant PL has made untrue and misleading statements as described above.

24 209. Defendant PL knew or in the exercise of reasonable care should have known that
25 its statements were untrue or misleading. The California Department of Fish and Game and

1 Department of Forestry served Defendant PL with notices of each and every violation of its
2 HCP, California Forest Practice Act, and the California Forest Practice Rules.

3 210. These untrue and misleading statements are violations of Business and Professions
4 Code section 17500 et seq. and are actionable under Section 17535. As violations of section
5 17500, they also constitute violations of Section 17200 and are actionable under 17203.

6 211. Plaintiffs, their members and staff, other persons in interest, and the general public
7 have been injured by Defendant PL's false advertising. These violations are continuing and will
8 continue unless enjoined by this Court.

9
10 **FOURTEENTH CAUSE OF ACTION (Against Defendant PL)**
11 **Violation of California Business and Professions Code Section 17580.5—Misleading**
12 **Environmental Marketing Claims**

13 212. The preceding paragraphs of this complaint are incorporated by reference as
14 though fully set forth herein.

15 213. Defendant PL has made false, deceptive, fraudulent, untrue, and misleading
16 statements as described above. These statements are untruthful, deceptive, or misleading
17 environmental marketing claims within the meaning of Business and Professions Code Section
18 17580.5 and are actionable under Section 17535.

19 214. Plaintiffs their members and staff, other persons in interest, and the general public
20 have been injured by Defendant PL's misleading environmental marketing claims. These
21 violations are continuing and will continue unless enjoined by this Court.

22 **PLAINTIFFS' PRAYER FOR RELIEF**

23 WHEREFORE, Plaintiffs respectfully request that this Court grant the following relief:

- 24 1. Order, declare and adjudge that Federal Defendants are in violation of 16 U.S.C. §
25

1 1536(a)(2) and its implementing regulations by failing to reinitiate consultation with themselves
2 concerning new information which reveals impacts to marbled murrelets, coho and chinook
3 salmon and coastal cutthroat and steelhead trout that were not previously considered by Federal
4 Defendants;

5 2. Order, declare and adjudge that Federal Defendants are in violation of 42 U.S.C. §
6 4332 and its implementing regulations by not supplementing the EIS for the HCP/ITP despite the
7 fact that significant new information exists concerning the impact of the ongoing action on the
8 environment;

9 3. Order, declare and adjudge that Federal Defendants are in violation of 33 U.S.C. §
10 1323 by permitting timber operations which are resulting in the systematic violation of water
11 quality standards and the Clean Water Act's antidegradation policy;

12 4. Order, declare and adjudge that Federal Defendants and Defendant PL are in
13 violation of Section 7(d) of the ESA at 16 U.S.C. § 1536(d) by irreversibly and irretrievably
14 committing resources;

15 5. Order, declare and adjudge that Federal Defendants' approval of the Biological
16 Opinion, Habitat Conservation Plan, and Incidental Take Permit was not based on the best
17 scientific and commercial data available and therefore was arbitrary, capricious, an abuse of
18 discretion, or otherwise not in accordance with law, in violation of 5 U.S.C. § 706(2)(A) and 16
19 U.S.C. § 1536(a)(2);

20 6. Order, declare and adjudge that Federal Defendants' authorization of the
21 Incidental Take Statement/Incidental Take Permit without making the required finding that
22 Defendant PL would, to the maximum extent practicable, minimize and mitigate the impacts of
23 the permitted take of listed species was arbitrary, capricious, an abuse of discretion, or otherwise
24
25

1 not in accordance with law, in violation of 5 U.S.C. § 706(2)(A) and 16 U.S.C. § 1539(a)(2)(B);

2 7. Order, declare and adjudge that Federal Defendants and Defendant PL have
3 violated and continue to violate 16 U.S.C. §§ 1538 (a)(2) and 1538(g), by committing,
4 permitting, or soliciting others to commit the unlawful take of marbled murrelet and coho
5 salmon;

6 8. Order, declare and adjudge that Defendant FWS's authorization of incidental take
7 of NSOs is in violation of the ESA, 16 U.S.C. §§ 1536(b)(3)-(4); 1539(a)(1)(B), because the
8 proposed activity for which the ITS/ITP was granted is not an otherwise lawful activity under
9 California state law;

10 9. Order, declare and adjudge that Defendant PL's violations of the California Forest
11 Practices Act, California Forest Practice Rules, its HCP and the ESA constitute unlawful and
12 unfair business acts or practices under the California Business and Professions Code section
13 17200;

14 10. Order, declare and adjudge that Defendant PL has made representations which are
15 false, deceptive, untrue, unfair, and misleading and by these acts, defendant PL has engaged in
16 unfair, deceptive, untrue, or misleading advertising within the meaning of section 17200;

17 11. Order, declare and adjudge that the deceptive, untrue, unfair, and misleading
18 statements and advertising made by defendant Pacific Lumber described above are fraudulent
19 business practices within the meaning of section 17200;

20 12. Order, declare and adjudge these untrue and misleading statements are violations
21 of Business and Professions Code section 17500 et seq., are actionable under section 17535, and
22 that as violations of section 17500, they are also automatically violations of section 17200 and
23 actionable under 17203;
24
25

1 13. Order, declare and adjudge that these statements are untruthful, deceptive, or
2 misleading environmental marketing claims within the meaning of Business and Professions
3 Code section 17580.5 and are actionable under section 17535;

4 14. Direct by injunctive relief that Federal Defendants are required to take the
5 necessary actions to reinitiate and complete consultation;

6 15. Direct by injunctive relief that Federal Defendants are required to supplement the
7 EIS for the HCP/ITP;

8 16. Direct by injunctive relief that Federal Defendants suspend any previously
9 authorized activities pursuant to the ITP which are resulting in violations of water quality
10 standards and the antidegradation policy, pursuant to 33 U.S.C. § 1323;

11 17. Direct by injunctive relief, pursuant to 16 U.S.C. §§ 1536, 1540, that Federal
12 Defendants are precluded from allowing, authorizing or permitting similar activities through the
13 completion of the required consultation process to the extent that such activities are causing, or
14 will cause, irreversible or irretrievable commitments of resources that would have the effect of
15 “foreclosing the formulation or implementation of any reasonable and prudent alternatives
16 measures”;

17 18. Direct by injunctive relief, pursuant to 5 U.S.C. § 706(2)(A) and 16 U.S.C. §§
18 1536, 1540, that the BO, HCP, and ITP at issue in this case be set aside as invalid and that
19 Federal Defendants be precluded from authorizing or permitting the continuation of Defendant
20 PL’s timber activities purportedly covered by the invalid BO, HCP, and ITP until such time as
21 Federal Defendants have prepared, published for public review and comment, and properly
22 approved a valid BO, HCP, and ITP based on and consistent with the best available scientific and
23 commercial data;
24
25

1 19. Direct by injunctive relief, pursuant to 16 U.S.C. §§ 1538, 1540, that Defendant
2 PL be precluded from engaging in, or soliciting any other to engage in, any timber operations on
3 the lands at issue in this case that are likely to result in take of marbled murrelet or coho salmon,
4 unless and until such activities are authorized by a properly prepared and approved BO, HCP and
5 ITP, and that Federal Defendants be precluded from permitting Defendant to engage in any
6 timber operations likely to result in the take any marbled murrelet or coho salmon until they have
7 properly prepared and approved a valid BO, HCP, and ITP covering such activities and take;

8 20. Direct by injunctive relief, pursuant to 16 U.S.C. §§ 1536, 1539, 1540, that
9 Federal Defendants are precluded from allowing, authorizing or permitting incidental take of
10 northern spotted owls as it is unlawful under state law;

11 21. Direct by injunctive relief that Defendant PL cease further violations of state and
12 federal environmental laws;

13 22. Direct by injunctive relief that Defendant PL cease further violations of the
14 California Business and Professions Code Section 17200 et seq., Section 17500 et seq., and
15 Section 17580.5;

16 23. Direct by injunctive relief that Defendant PL remediate all harm it has caused or
17 contributed to by its violations;

18 24. Order Defendant PL to pay restitution of all money and property that Defendant
19 PL wrongfully acquired by means of unfair competition;

20 25. Award Plaintiffs their reasonable costs, litigation expenses, and attorney fees
21 associated with this litigation as provided by the Endangered Species Act, 16 U.S.C. §
22 1540(g)(4); and/or the Equal Access to Justice Act, 28 U.S.C. § 2412; and California Code of
23 Civil Procedure § 1021.5; and
24
25

1 26. Such other and further relief as this Court deems just and proper.

2
3 DATED, December 30, 2004.

4
5 Respectfully submitted,

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